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10/572,719	03/21/2006	Ronald Vermeer	CS-8755/BCS033048	4678
34469 7590 03/25/2010 BAYER CROPSCIENCE LP Patent Department 2 T. W. ALEXANDER DRIVE RESEARCH TRIANGLE PARK, NC 27709				
EXAMINER FISHER, ABIGAIL L				
ART UNIT		PAPER NUMBER		
1616				
NOTIFICATION DATE		DELIVERY MODE		
03/25/2010		ELECTRONIC		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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### Office Action Summary

**Application No.**

10/572,719

**Applicant(s)**

VERMEER, RONALD

**Examiner**

ABIGAIL FISHER

**Art Unit**

1616

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 16 December 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 11, 14-17 and 22 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 11, 14-17 and 22 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB-08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

### DETAILED ACTION

Receipt of Amendments/Remarks filed on December 16 2009 is acknowledged.  
Claims 1-10, 12-13, 18-21 and 23-24 were/stand cancelled. Claim 11 was amended.  
Claims 11, 14-17 and 22 are pending.

Rejections and/or objections not reiterated from previous office actions are hereby withdrawn. The following rejections and/or objections are either reiterated or newly applied. They constitute the complete set presently being applied to the instant application.

#### Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Applicant Claims
2. Determining the scope and contents of the prior art.
3. Ascertaining the differences between the prior art and the claims at issue, and resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

The rejection of claims 11, 14-15, 17 and 21 under 35 U.S.C. 103(a) as being unpatentable over Grayson (US Patent No. 5393770, cited in the Office action mailed on 3/25/09) as evidenced by Wingert et al. (US Patent No. 5532260) in view of Aven (EP 1023832) and Herold et al. (USPGPUB No. 20030144147) is **withdrawn** in light of Applicant's amendments filed on 12/16/09.

The rejection of claim 16 under 35 U.S.C. 103(a) as being unpatentable over Grayson as evidenced by Wingert et al. in view of Aven and Herold et al. and in further view of Mauler-Machnik et al. (US Patent No. 6559136) and Heinemann et al. (WO 9727189) is **withdrawn** in light of Applicant's amendments filed on 12/16/09.

The rejection of claims 11 and 21-22 under 35 U.S.C. 103(a) as being unpatentable over Strom et al. (US PGPUB No. 20010051175) in view of Stock et al. (Pestic. Sci., 1993) is **withdrawn** in light of Applicant's amendments filed on 12/16/09.

**Modified Rejection Based on amendments in the reply filed on December 16 2009**

**Claims 11, 14-15, 17 and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Strom et al. (US PGPUB No. 20010051175, cited in the Office action mailed on 10/01/09) in view of Stock et al. (Pestic. Sci., 1993, cited in the Office action mailed on 10/01/09) and Aven (EP 1023832, cited in the Office action mailed on 10/16/09).**

### **Applicant Claims**

The instant application claims a suspension concentrate consisting of between 10 and 40% by weight, based on the suspension concentrate, of at least one active compound that is solid at room temperature selected from the group consisting of azaconazole, bitertanol, bromuconazole, cyproconazole, diclobutrazole, difenoconazole, diniconazole, epoxiconazole, etaconazole, fenbuconazole, fluquinconazole, flusilazole, flutriafol, imibenconazole, ipconazole, myclobutanil, paclebutrazol, penconazole, propiconazole, prothioconazole, simeconazole, tebuconazole, tetraconazole, triadimefon, triadimenol, triticonazole, dimoxystrobin, fluoxastrobin, kresoxim-methyl, metaminostrobin, picoxystrobin, pyraclostrobin, and trifloxystrobin; between 5 and 20% by weight, based on the suspension concentrate, of at least one alkanolethoxylate of formula I; and between 3 and 8% by weight, based on the suspension concentrate of at least one dispersant mixture; between 40 and 65% by weight, based on the suspension concentrate of water; and between 0 and 15% by weight, based on the suspension concentrate of one or more additives. The dispersants are selected from the group consisting of the polymers of methyl 2-methyl-2-propenoate and  $\alpha$ -(2-methyl-1-oxo-2-propenyl)- $\omega$ -methoxy-poly(oxy-1,2-ethanediyl), tristyrilphenolethoxylates, and propylene oxide/ethylene oxide block copolymers having molecular weights between 8000 and 10,000.

### **Determination of the Scope and Content of the Prior Art (MPEP §2141.01)**

Strom et al. is directed to aqueous dispersions of agricultural chemicals. Example of active agents that can be utilized include insecticides such as triazoles (paragraph 0012) and fungicides such as azoles such as hexaconazole and strobilurins such as azoxystrobin (paragraph 00130. The surface active agent included may be anionic, cationic or nonionic, or combinations of cationic and nonionic or anionic and nonionic. A stabilizing amount of the surfactant is used, preferably not less than about 1% and not more than 30% by weight based on the total weight of the water, pesticide and surfactant (paragraph 0014). Specific examples of commercially available surface active agents include Atlox 4991 and 4913 surfactants (nonionic), Pluronic P104 (nonionic), and Soprophor FL surfactant (anionic). The pesticide is in an amount from about 1 to about 60% (claim 1). Exemplified pesticides include epoxiconazole (example 7).

**Ascertainment of the Difference Between Scope the Prior Art and the Claims  
(MPEP §2141.012)**

While Strom et al. teach surfactant combinations of an anionic and nonionic surfactant, Strom et al. do not exemplify utilizing Atlox 4913 in combination with Soprophor FL.

Strom et al. do not teach the incorporation of an alkanolethoxylate. However, this deficiency is cured by Stock et al.

Stock et al. is directed to development of a predictive uptake model to rationalize selection of polyoxyethylene surfactant adjuvants for foliate-applied agrochemicals. Stock teaches that surfactant adjuvants are included routinely in foliate-applied pesticide formulations to enhance their performance (page 233, first paragraph). These

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adjuvants have two main purposes: (i) as spray modifiers to increase retention and target coverage and (ii) as activators to enhance foliar uptake and biological performance (page 234, first paragraph). Stock et al. investigated what chemical and physical factors influence the surfactant induced foliage uptake of agrochemicals (page 234, second column). The model organic compounds utilized were methylglucose, phenylurea, cyanazine, permethrin and WL110547 (a tetrazole). The model compounds covered a log P range of -3.0 to 6.5 (page 234, section 2.2 and table 1). The surfactants utilized were alcohol ethoxylates with increasing ethylene oxide content ranging from 6 to 20. The alcohol portion is a C<sub>13</sub>/C<sub>14</sub> (page 234, section 2.3). It was found that the ethylene oxide content had a significant influence on the magnitude of uptake activation of the five model compounds with E15 and E30 having the greater uptake (page 236, section 3.1 and tables 3-6). The other influence is concentration. Figures 1-5 show the influence of ethylene oxide (E) content and surfactant concentration on the uptake of the compounds. All of the surfactants increased uptake for all of the model compounds tested. Concentrations utilized were 0.2, 1 and 5 g/L (this is diluted form).

While Strom et al. teach that triazoles can be incorporated, Strom et al. do not teach the incorporation of tebuconazole or tebuconazole and trifloxystrobin. However, this deficiency is cured by Aven.

Aven is directed to aqueous suspension concentrates. The compositions comprise 50 to 400 g/L of a crop protection compound, 50 to 500 g/L of an adjuvant and at least one surfactant selected from the group consisting of (c1) 5 to 75 g/L of one or

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more non-ionic dispersant and (c2) 10 to 100 g/L of one or more anionic dispersants (abstract). Fungicides taught include bitertanol, bromuconazole, cyproconazole, diclobutazole, difenoconazole, diniconazole, epoxiconazole, etaconazole, fenbuconazole, fluquinconazole, flusilazole, flutriafol, metconazole, ipconazole, myclobutanil, penconazole, propiconazole, hexaconazole, tebuconazole, tetraconazole, triadimefon, tridimenol, triticonazole, kresoxim-methyl and trifloxystrobin (paragraph 0017). Surfactants/dispersants taught include non-ionic dispersants such as polyethyleneoxide-polypropyleneoxide block copolymers (paragraph 0042). The most preferred are the Pluronic type block copolymers such as Pluronic PE 10500 (paragraph 0043). Anionic dispersants taught include Soprophor FL (table page 10). Both Pluronic PE 10500 and Soprophor FL are exemplified.

***Finding of Prima Facie Obviousness Rationale and Motivation  
(MPEP §2142-2143)***

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al., Aven and Stock et al. and utilize an ethoxylate alcohol as a surfactant adjuvant in order to enhance foliar uptake. One of ordinary skill in the art would have been motivated to add an ethoxylated alcohol as Stock et al. teach that these surfactants are routinely included in pesticide formulations to enhance their performance and the inclusion of these adjuvants enhanced the absorbance of a variety of compounds regardless of the log P. Therefore, one of ordinary skill in the art would have been motivated to add ethoxylate alcohols to the formulation of Strom et al. to enhance absorbance of the pesticides based on the teachings of Stock et al.



It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al., Aven and Stock et al. and utilize an anionic and nonionic surfactant in combination together such as Atlox 4913 and Soprophor FL. One of ordinary skill in the art would have been motivated to utilize a combination of an anionic and nonionic surfactant as this is one specific combination taught as being suitable. Atlox 4913 is a specifically taught commercially available nonionic surfactant and Soprophor FL is a specifically taught commercially available anionic surfactant. Therefore, it would have been obvious to one of ordinary skill in the art to utilize these specifically taught surfactants in a specifically taught surfactant combination.

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al., Stock et al. and Aven and utilize tebuconazole and trifloxystrobin in the invention of Strom et al. One of ordinary skill in the art would have been motivated to add these active compounds as Strom et al. teach that triazoles can be included and the taught triazoles (epoxiconazole and hexaconazole) have the same function (i.e. fungicide) as tebuconazole and trifloxystrobin as taught by Aven. As a general principle it is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose, the idea of combining them flows logically from their having been individually taught in the prior art. See *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) **MPEP 2144.06**.

Regarding the claimed amount of active compound, water and dispersant mixture, Strom et al. teach an amount that overlaps that instantly claimed. In the case where the claimed ranges "overlap or lie inside ranges disclosed by the prior art" a *prima facie* case of obviousness exists. **See MPEP 2144.05 [R-5].**

Regarding the claimed amount of the alcohol ethoxylate, Stock et al. teach that manipulation of the ethoxylate content as well as concentration effect the absorbance of the agrochemicals. Since the desired amount in the dilute form ranges from 0.2 to 5 g/L, it would have been obvious to one of ordinary skill in the art to vary the amount of the ethoxylate in order to achieve the desired absorbance. The amount of a ethoxylate in a composition is clearly a result effective parameter that a person of ordinary skill in the art would routinely optimize. Optimization of parameters is a routine practice that would be obvious for a person of ordinary skill in the art to employ and reasonably would expect success. It would have been customary for an artisan of ordinary skill to determine the optimal amount of ethoxylate to add in order to best achieve the desired absorbance. It would have been obvious to one of ordinary skill in the art at the time of the invention to engage in routine experimentation to determine optimal or workable ranges that produce expected results. Where the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation. *In re Aller*, 220 F. 2d 454, 105 USPQ 233 (CCPA 1955).

Regarding the claimed length of the alkanolethoxylate, Stock et al. teach an amount that overlaps that instantly claimed with specific examples falling within the instant claimed range. In the case where the claimed ranges "overlap or lie inside

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ranges disclosed by the prior art" a *prima facie* case of obviousness exists. **See MPEP 2144.05 [R-5].**

Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention. Therefore, the invention as a whole would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made.

**Claims 11 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Strom et al. in view of Stock et al. and in further view of Mauler-Machnik et al. (US Patent No. 6559136, cited in the Office action mailed on 10/01/09) and Heinemann et al. (WO 9727189, cited in the Office action mailed on 10/01/09).**

#### **Applicant Claims**

The instant application claims the active compounds are prothioconazole and fluoxastrobin.

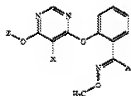
#### **Determination of the Scope and Content of the Prior Art (MPEP §2141.01)**

The teachings of Strom et al. and Stock et al. are set forth above. Strom et al. is directed to aqueous dispersion comprising active compounds which include triazoles such as epoxiconazole and hexaconazole. The active ingredients are combined with surfactant combinations and water to form pesticidal compositions. Stock et al. teach that the addition of surfactant adjuvants such as ethoxylated alcohols enhance absorption of agrochemicals.

**Ascertainment of the Difference Between Scope the Prior Art and the Claims  
(MPEP §2141.012)**

Strom et al. do not specify that the fungicides are fluoxastrobin and prothioconazole can be added. However, this deficiency is cured by Heinemann et al. and Mauler-Machnik et al.

Mauler-Machnik et al. found that utilizing fungicide compounds of general formula I in combination with other fungicides such as tebuconazole (3), epoxiconazole (10), metconazole (11), 2-(1-chloro-cyclopropyl)-1-(2-chlorophenyl)-3(5-mercapto-1,2,4-triazol-1-yl)-propan-2-ol (aka prothioconazole) (69) and trifloxystrobin (75) found in columns 1 and 2 and claim 1 have very good fungicidal properties (column 2, lines 60-62). Compounds of Formula I have the following structure:



in which

Z represents optionally substituted phenyl,

X represents halogen and

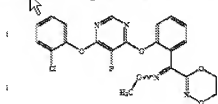
A represents heterocyclyl —COOCH<sub>3</sub> or —CO—NH—  
CH<sub>3</sub> and

It is taught that the compounds of the formula I are known for example in WO 9727189 (column 3, lines 34-35).

Heinemann et al. (wherein US Patent No. 6103717 is serving as the English Language Equivalent) teach the compounds of formula 1 from Mauler-Machnik et al. One specific compound claimed is:

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8. The compound of the formula (I) according to claim 1, which is 3-[1-(2-(4-(2-chlorophenoxy)-5-fluorophenyl)-phenyl)-1-(methoxymino)-methyl]-5,6-dihydro-1,4,2-dioxazine, having the formula:



This compound is fluoxastrobin.

### ***Finding of Prima Facie Obviousness Rationale and Motivation (MPEP §2142-2143)***

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al., Stock et al., Mauler-Machnik et al. and Heinemann et al. and utilize fluoxastrobin and prothioconazole in the invention of Strom et al. One of ordinary skill in the art would have been motivated to utilize fluoxastrobin and prothioconazole as Mauler-Machnik et al. teach utilizing generic compounds which encompass fluoxastrobin in combination with epoxiconazole and prothioconazole. Since Mauler-Machnik et al. teach compounds of their formula I can be found in Heinemann et al., one of ordinary skill in the art would look to this patent for specific compounds of formula I. One specific compound taught and claimed is fluoxastrobin. Therefore, Mauler-Machnik et al. teach utilizing fluoxastrobin in combination with epoxiconazole and prothioconazole and their combination would have been obvious to one of ordinary skill in the art. As a general principle it is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very

same purpose, the idea of combining them flows logically from their having been individually taught in the prior art. See *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) **MPEP 2144.06**.

Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention. Therefore, the invention as a whole would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made.

### ***Response to Arguments***

Applicants argue that (1) Strom et al. discloses aqueous dispersions and given the general nature of the pesticides described as suitable and the broad scope of surfactants described as suitable, one of skill in the art would hardly find a reason to make or use the particularly narrowly defined combinations claimed. Applicants argue (2) Stock et al. teaches that alkanol alkoxylate having a high ethylene oxide content work better than those with a low ethylene oxide content. Applicants argue that compounds with an intermediate logP, no correlation with ethylene oxide content was observed by Stock et al. It is argue that these results would not suggest the use of the narrowly defined alkanol ethoxylates of applicants' formula I. Applicants argue that (3) Aven while disclosing aqueous suspension concentrates does not disclose or suggest penetration enhancers such as Genapol C-100 or other alkanol ethoxylates within the meaning of Applicants' component (b). Applicants argue that (4) Mauler-Machnik et al. and Heinemann et al. do not bridge the gap from what is missing of Strom et al.

Applicants' arguments filed December 16 2009 have been fully considered but they are not persuasive.

In response to applicants' arguments in general, applicants appear to be arguing the references individually. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Applicants have not argued why it would not have been obvious to one of ordinary skill in the art to manipulate the formulation taught by Strom et al. to incorporate the polyoxyethylene surfactant adjuvants taught by Stock et al. or the specific fungicides taught by Aven or Mauler-Machnik et al. and Heinemann et al.

Regarding applicants' first argument, while Strom et al. teach that the general types of insecticidal and fungicidal compounds that can be used include triazoles, azoles and strobilurins, the only instantly claimed fungicide taught by Strom et al. is epoxiconazole. However, Aven teaches a similar type composition (aqueous suspension concentrate) and that the disclosed fungicides include strobins and azoles (including epoxiconazole). Therefore, the examiner maintains that it would have been obvious to include the strobins and azoles taught by Aven in the composition of Strom et al. as Strom et al. teach that the active agents include azoles and strobins. Furthermore, out of the 33 instantly claimed active compound, 24 are taught by Aven. Therefore, there is significant overlap over the claimed azoles and strobins and those taught by Aven. Applicants have not demonstrated the unobviousness of the

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specifically claimed active compounds. Strom et al. teaches that the surface active agent included may be anionic, cationic or nonionic, or combinations of cationic and nonionic or anionic and nonionic. Therefore, a specific combination contemplated is nonionic and anionic. Specific examples of commercially available surface active agents include Atlox 4991 and 4913 surfactants (nonionic), Pluronic P104 (nonionic), and Soprophor FL surfactant (anionic). Therefore, Strom et al. teach a finite number of commercially available surfactants and specifically teach combinations of nonionic and anionic are suitable. Therefore, one of ordinary skill in the art would have been motivated to utilize Atlox 4913 and Soprophor FL (these surfactants read on the claimed ci).

Regarding applicants' second argument, while the sections pointed to by applicant showing the difference between alkanol alkoxylate having a high ethylene oxide content vs. a low ethylene oxide content show that the high ethylene oxide content work better, the low ethylene oxide content composition skill increased uptake of the model compounds. Fig. 1 shows a dose dependence of the uptake and the amount of surfactant added. Even with an ethylene oxide content of 6 at 5% showed 32% uptake whereas 1% only had 13% uptake. This clearly shows that an increase in uptake occurs with increasing amounts of surfactant. Furthermore, the AE11 which reads on the instant claims shows the same kind of trend (i.e. more surfactant increases the uptake). Additionally, figure 2 shows the opposite effect that what applicants argue (i.e. lower ethylene oxide content created more uptake than the higher ethylene oxide content surfactants). As taught by Stock et al. (page 241, pointed to by applicants), the



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difference can be explained by the log P of the compounds such that compounds with a high log P (such as propiconazole) shows greater uptake enhancement with surfactants with a low ethylene oxide content whereas compounds which have a higher water-solubility show greater enhancement with surfactants of a high ethylene oxide content. What Stock et al. explains is that depending on the log P of the compound it may be more beneficial to choose a surfactant with either a high or low ethylene oxide content. Stock et al. does not teach that those with an intermediate log P showed no enhancement just that no correlation with the ethylene oxide content of the surfactant was observed such that it didn't matter either one used high or low ethylene oxide content surfactant. Finally, the examiner reiterates even though in certain situations a surfactant with a low or high ethylene oxide compound may work better, those with the opposite ethylene oxide content still worked. It may have worked to a lesser degree, but it still provided some uptake enhancement. This is not a teaching away from utilizing surfactant with a lower ethylene oxide content.

Regarding applicants' third argument, Aven is not utilized for its surfactant teachings. Aven is used to show other azoles and strobins which are known in the art to be utilized in aqueous suspension concentrates. One of ordinary skill in the art would have a reasonable expectation of success of utilizing the azoles and strobins taught by Aven in the compositions of Strom et al. as Strom et al. exemplify utilizing epoxiconazole and teach azoles and strobins can be utilized and Aven teach utilizing these azoles and strobins in aqueous suspension concentrates with surfactants/dispersants such as Pluronic PE 10500 and Soprophor FL. Since the

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surfactants and the type of composition made of Aven is the same or similar to that of Strom et al. one of ordinary skill in the art would have a reasonable expectation of success.

Regarding applicants' fourth argument, Strom et al. teach azoles and strobins are suitable fungicides to be utilized and exemplifies utilizing epoxiconazole. Mauler-Machnik et al. teach utilizing generic compounds which encompass fluoxastrobin in combination with epoxiconazole and prothioconazole. Since Mauler-Machnik et al. teach compounds of their formula I can be found in Heinemann et al., one of ordinary skill in the art would look to this patent for specific compounds of formula I. One specific compound taught and claimed is fluoxastrobin. Therefore, Mauler-Machnik et al. teach utilizing fluoxastrobin in combination with epoxiconazole and prothioconazole and their combination would have been obvious to one of ordinary skill in the art.

Therefore, the rejection is maintained since applicant has not provided any persuasive arguments to overcome the rejection.

### ***Conclusion***

No claims are allowed.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ABIGAIL FISHER whose telephone number is (571)270-3502. The examiner can normally be reached on M-Th 9am-6pm EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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